88-350 (1)

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DEBORAH ANDERSON and LAWRENCE ANDERSON,
Petitioners,

v.

NORTH DAKOTA,
Respondent.

MARK DAGLEY and LYNETTE DAGLEY,
Petitioners,

v.

NORTH DAKOTA,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of North Dakota

MICHAEL P. FARRIS
President
Home School Legal Defense
Association
731 Walker Road
Suite E2
Great Falls, VA 22066
(703) 759-7577
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

North Dakota is the sole state which imposes the requirement of teacher's certification for home schooling parents.

1. Has North Dakota violated this Court's interpretation of the Free Exercise Clause by insisting on certification in the face of evidence that it is not the least restrictive means of achieving the state's interest in education?

PARTIES

Petitioners are Deborah Anderson (ND Sup. Ct. No. 870261) and Lawrence Anderson (ND Sup. Ct. No. 870262) and Mark and Lynette Dagley (ND Sup. Ct. No. 970180). Respondent is the State of North Dakota.

TABLE OF CONTENTS

Questions Presented i

Parties i

Table of Contents ii

Table of Authorities. iii

Opinions Below. 1

Jurisdiction of This Court. 2

Constitutional and Statutory Provisions 3

Statement of the Case 5

Reasons for Granting the Writ . . 24

A. Introduction 24

B. Teacher's Certification Flunks the Least Restrictive Means Test 28

1. North Dakota Stands Alone in Imposing a Teacher's Certification Requirement 28

2. The State Made No Attempt To Prove That Its Requirement Was The Least Restrictive Alternative. 37

TABLE OF AUTHORITIES

Cases

Abington School District v. Schempp,
374 U.S. 203, (1963) 42

Fellowship Baptist Church v.
Benton, 815 F.2d 486
(8th Cir. 1986). 36

Hobbie v. Unemployment Appeals
Comm'n of Florida, 480 U.S.__,
94 L.Ed.2d 190 (1987). 37

Lyng v. Northwest Indian Cemetery
Protective Association,
__ U.S. __, 108 S.Ct. 1319,
99 L.Ed. 2d 534 (1988) 20

McDaniel v. Paty,
435 U.S. 618 (1978). 26,27

People v. Darah,
No. 853104 (Santa Maria Mun.
Ct. Mar. 10, 1986) 35

People v. Black,
No. 853105 (Santa Maria Mun.
Ct. Mar. 10, 1986) 35

Pierce v. Society of Sisters,
268 U.S. 510 (1925). 26

Sheridan Road Baptist v. Department
of Educ., 396 N.W.2d 373
(Mich. 1986) 36

Sheridan Road Baptist v. Department
of Education, Ingham County

Circuit Court, No. 80-26205-AZ,
May 2, 1988 (Mich) 38

State of North Dakota v. Patzer,
382 N.W.2d 631 (N.D. 1986),
cert. denied ___ U.S. ___,
107 S.Ct. 99,
93 L.Ed.2d 50 (1986) . . . passim

Wisconsin v. Yoder,
406 U.S. 205 (1972). . . . passim

Constitutional and Statutory Provisions

First Amendment of the Constitution of
the United States. . . . . passim

Fourteenth Amendment of the Constitution
of the United States . . . passim

Statutes

Ariz. Rev. Stat. § 15-802 30

Ark. Stat. § 80-152 30

Colorado, C.R.S. § 22-33-104.5. . 30

Fla. S. A. § 228.041. 30

Geo. Code Ann. § 32-2104 (b). . . 30

Haw. Rev. Stat. §248-9. 30

Louisiana Stat. Ann.-R.S.
§ 17:236.118 30

Maine Rev. Stat. Ann.

§5001 (2)(D) 30

Ann. Code of Md. §7-301(a). . . . 30

Minn. Stat. Ann. § 120.10 (1) . . 30

Mississippi Code Ann.
§ 37-13-91 (3) (c) 30

Mo. Stat. § 167.031 30

Mont. Stat. § 20-5-102 (2) (f). . 30

Nev.R.S. 392.070. 30

New Hampshire, N.H. Rev. Stat. Ann.
§ 193:1, N.H. Regulations and
Procedures, ED 315.01-04 . . . 30

New York Comp. R. & Regs.
8 §100.1 (1988). 30,31

New Mexico Stat. Ann. § 22-1-2
(1985) 30

N.C. Gen. Stat. §115C-547 30

North Dakota Century Code §15-34.1
. . . . . passim

Ohio Rev. Code § 3321.04 (A)(2) . 30

Ore.R.S. § 339.030 (6). 30

R.C.W. [Wash. Rev. Code]
§ 28A.27.010 (4) 30

Rhode Island, § 16-19-1 Gen.
Laws of R. I.. 30

South Carolina, S.C. Ann.

§ 59-65-40(A), (1988). 30

Tenn. Code Ann. § 49-6-3050 . . . 30

Utah Code Ann. § 53-24-1 (2). . . 30

Vermont S.A. § 1121 (2) 30

Virginia Code § 22.1-254.1. . .13,30

West Virginia, W.Va. Code
§ 18-8-1(b), (1987). 30

Wisc. Stat. §115.01(1r), §118.15(4),
§118.165 (1) 30

Wyoming Stat. § 21-4-101. 30

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

DEBORAH ANDERSON, et al.,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Dakota entered in these proceedings on June 28, 1988 (Anderson) and on July 19, 1988 (Dagley).

OPINIONS BELOW

The opinions of the North Dakota Su-

preme Court are unpublished at this time. They appear in the appendix beginning at 1a (Anderson) and at 52a (Dagley). The written decision of the Stutsman County Court (Anderson) was entered on August 14, 1987. It is unpublished. It appears in the appendix beginning at 54a. The written decision of the Morton County Court was entered on June 1, 1987. It is unpublished. It appears in the appendix beginning at 60a.

JURISDICTION OF THIS COURT

Petitioners respectfully show the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of decisions of the Supreme Court of North Dakota filed on June 28, 1988 (Anderson) and July 19, 1988 (Dagley). These are criminal cases (truancy).

(ii) Jurisdiction for review of this

matter by certiorari is conferred on this Court by 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment to the Constitution of the United States

. . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

North Dakota Century Code § 15-34.1-03(1)

Compulsory attendance--Exceptions. The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

(1) That the child is in attendance for the same length of time at a parochial or private school approved by the county

superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-42-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

(2) That the child has acquired the branches of learning taught in the public schools and has completed high school.

(3) That the child actually is necessary to the support of his family, which shall be a question of fact to be determined by the governing board of the district with the approval of the county superintendent of schools, and such determination shall be subject to review by the superintendent of public instruction on appeal.

(4) That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable. Such condition shall be shown by a declaration of a multi-disciplinary team which includes the director of special education of the special education unit of which the school district of residence is a member, the school superintendent of the child's district of residence, the child's classroom teacher, the child's physician, and the child's parent or guardian."

STATEMENT OF THE CASE

These cases[1] involve a constitutional challenge to North Dakota's law which effectively prohibits home schooling for almost all citizens of that state.

Mark and Lynette Dagley teach their daughter, Carrie, age 9 (age 8 when charges were first brought), at their home in Mandan, North Dakota. Mr. Dagley has a bachelor's degree from Bob Jones University and a Master of Divinity Degree from Westminster Theological Seminary. He also has a two year degree in electronics from Bismarck Junior College. Mrs. Dagley has a bachelor's degree in Christian Educa-

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[1]These two cases were not consolidated below. However, they involve identical legal issues and the Supreme Court of North Dakota treated its decision in the Anderson case as entirely dispositive of the Dagley case. Accordingly, pursuant to Supreme Court Rule 19.4, a single petition for writ of certiorari is being filed.

tion from Bob Jones University. She is not a North Dakota certified teacher. She is Carrie's primary teacher.

The unrebutted testimony at their bench trial was that the Dagleys, who teach a full curriculum of all state-mandated subjects, are providing an excellent education for Carrie.

Lawrence and Deborah Anderson teach their five children at their home in Jamestown, North Dakota. Only three of these children are the subject of this litigation since one is below and one is above compulsory school age.[2] Mr. Anderson received a two year degree from Trinity Bible College in Ellendale, North Dakota. He is the primary teacher of the children. Mrs. Anderson is a high school

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[2]N.D.C.C. § 15-34.2-01 establishes compulsory school age as "any educable child of seven years to sixteen years."

graduate.

John Wesley Taylor, Ph.D., testified as an expert for the Andersons in their non-jury trial. His unrebutted testimony was that the Andersons are providing a quality education for their children.

The Dagley case was tried on March 24 and 25, 1987, before the Honorable Thomas J. Schneider, County Judge of the Morton County Court. He took the matter under advisement at the conclusion of trial and issued a written decision on June 1, 1987. A trial brief was filed on March 24, 1987, raising the federal constitutional issues presented herein.

The Dagleys presented a number of constitutional issues to the trial court and to the Supreme Court of North Dakota. including the sole question raised in this court, to wit: Has North Dakota adopted the least restrictive means of

assuring accountability for home education?[3]

This statutory rule was challenged in the trial court as violating the First Amendment's Free Exercise Clause.

The trial court held that the Dagley's religious beliefs that God requires them to teach their own child were sincerely held. Appendix at 66a. The trial court also held that the state's requirement that a parent must possess a North Dakota teaching certificate burdened the exercise of those sincerely held beliefs. App at 67a.

The Dagleys conceded that the State of North Dakota possesses a compelling state interest in the area of education,

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[3]North Dakota is the only state in the country which currently requires home schooling parents to possess a teaching certificate as the sole method of legally providing instruction for their own children.

but challenged the statutory requirement of teacher's certification as violating the least restrictive means doctrine enunciated by this Court in numerous free exercise cases.

The trial court relied on a prior decision of the Supreme Court of North Dakota, State of North Dakota v. Patzer, 382 N.W.2d 631 (N.D. 1986), cert. denied ___ U.S. ___, 107 S.Ct. 99, 93 L.Ed.2d 50 (1986), in holding that teacher's certification was the least restrictive means available to assure the state's interest in education. In reaching its ruling, the trial court held that the decision in Patzer should not be distinguished even in light of the substantially different and new evidence brought to the court on the least restrictive means issue.

This evidence showed that subsequent to the Patzer decision, the North Dakota

legislature requested the State Superintendent of Public Instruction to convene a study committee to determine if there were educationally sound alternatives to the requirement of teacher's certification.

Such a committee was convened in late 1986. It consisted entirely of public school officials and advocacy groups (e.g., the North Dakota affiliate of the National Education Association). No home schooling or private schooling representative held a seat on the committee. Moreover, the committee did not even consult with any home schooling advocates or representatives during their study.

The committee did make a study of the laws governing home schooling in other states. After this study the committee made a finding, which it reported to the legislature, that indeed less restrictive

alternatives to teacher's certification were available. The committee recommended a legislative package of requirements. The critical change was that students in the elementary years could be taught by parents with a bachelor's degree rather than the more strenuous requirement of teacher's certification.

The public education advocates on the committee were unanimous in concluding that this less restrictive alternative was educationally acceptable. Although the committee made it clear that they would prefer teacher's certification, they conceded that a lesser requirement would meet the state's interest in education.

The evidence at trial also focused on a bill which nearly passed the North Dakota House of Representatives in 1987. Engrossed House Bill No. 1523 passed the

House Education Committee and received a majority affirmative vote of those present and voting. The vote was 53-47 in favor of the bill. However, under North Dakota legislative rules a majority of all house members (54) are required to pass any bill and thus the bill failed by one vote.

This bill would have required the following of home schooling parents in North Dakota:

Parents were required either to hold a college baccalaureate degree, pass the basic skills section of a teacher proficiency examination, or hold a North Dakota teaching certificate. The child was required to make satisfactory progress compared to public school standards of promotion, as tested by the Iowa test of Basic Skills, the Stanford Achievement Test, the California Achievement Test, or

another test approved by the superintendent of public instruction. Testing would have been monitored by a certified teacher, a local school administrator, or the county superintendent. Instruction was required for at least 175 days per year, and four hours per day.

This package of requirements was found to be sufficient by a majority of those legislators who were present and voting.

The State Superintendent, Dr. Wayne Sanstead, testified[4] that his study committee had reviewed the Virginia home schooling law[5] and concluded that it

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[4]Dr. Sanstead's testimony was taken in a deposition and entered by stipulation.

[5]Va. Code Ann. § 22.1-254.1 (Supp. 1988) provides the following package of requirements for home schooling. Parents must qualify under one of four criteria. They must (1) be a certified teacher, (2) have a bachelor's degree, (3) use a state-approved correspondence course, or

covers all of the "relevant areas in terms of trying to assure that the youngsters receive a comparable education."

Assistant Superintendent of Public Instruction Ronald Stastney testified that the study committee's recommendations were less restrictive than the current law and that the requirements would "satisfy the interests of the state." Dagley Tr. at 220-221.

Stastney also testified that some proposal compromising between the House Bill and the Department of Education study committee's recommendations would

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(4) secure the consent of the local superintendent by showing a proper course of study and an adequate education. The requirements under the fourth alternative are clearly defined in the statute.

Virginia also requires parents to submit an advance notice of intent and a description of the curriculum. Annual standardized achievement testing is required. Children must score at the 40th percentile or higher.

have been acceptable to the Department. Dagley Tr. at 224. He readily admitted that none of the alternative proposals required every parent to be a certified teacher. Id.

Stastney also admitted that there is no scientific evidence that possessing a teaching certificate is better, in terms of ability to teach, than having a bachelor's degree, two years of college, or even a high school diploma. Dagley Tr. at 297. He also admitted that there is no scientific backing for the opinion about certified teachers upon which North Dakota law is based. Dagley Tr. at 298.

In addition to these admissions by the state's own experts, the Dagleys' expert, Dr. Raymond Moore, testified extensively that there were other packages of requirements which would satisfy the state's interest in education while

permitting a great deal more freedom for parents desiring to educate their own children.

The trial court found this testimony unpersuasive on the issue of least restrictive means and upheld the statutory requirement on the authority of the Patzer decision, adding simply:

> Thus, the Court held that the requirement of teacher certification was the least restrictive and constitutional.

App. at 68a.

Later in its opinion, the trial court tersely rejected the arguments concerning the intervening evidence including the study committee and the legislative history.

> The study done by Dr. Sanstead's committee did not result in the North Dakota legislature passing a baccalaureate degree exception.

App. at 70a.

The trial court sentenced the Dagleys

to pay a fine of $250 each.

The Andersons were tried in the Stutsman County Court on May 7 and 8, 1987. Similar testimony regarding the study committee and the legislation was introduced in the Anderson trial. Assistant Superintendent Stastney again testified. This time, however, he also included testimony that the motivation of the state officials in proposing and agreeing to these alternative requirements was related to a desire to end the constant litigation on the subject.

The trial court in Stutsman County also held that the disposition in the Patzer case was still binding. It rejected arguments based on the new evidence suggesting that less restrictive alternatives were indeed available.

The trial court imposed the statutory maximum fine of $500 for each parent,

plus court costs against Mr. and Mrs. Anderson.

The free exercise issues were again pursued in both cases in the North Dakota Supreme Court. By a four-to-one vote,[6] the majority held that teacher's certification remained the least restrictive means of achieving the state's interest in education.

The court correctly stated the tests established by this Court for review of free exercise claims. The court noted that most of the issues in this test were stipulated between the parties.

> The parties concede that the Andersons' religious beliefs are sincere and that teacher certification has an adverse affect on the practice of their religion. They also concede that the State has a compelling in-

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[6]The Anderson case was decided first with a full opinion by the court. In Dagley, the court simply issued a two-sentence opinion indicating that the decision in the Anderson matter was controlling.

> terest in the education of children. Thus the only disputed issue in the free exercise area is whether or not the State has chosen the least restrictive alternative to achieve its compelling interest.

App. at 26a-27a.

The majority rejected the argument that the experience of the other states was indicative of there being a less restrictive means than certification by simply quoting their decision in Patzer. As to the study done by Dr. Sanstead's committee, the majority gave it no effect since, they concluded, it "was conducted to avoid litigation that had arisen out of the teacher certification requirements and do[es] not demonstrate a less restrictive alternative that would satisfy the State's compelling interest in education." App. at 35a.

The majority silently dismissed the arguments based on House Bill 1523 by

simply citing its existence in a footnote and noting that it did not pass.

Although he had concurred with the majority in Patzer, Justice Meschke issued a vigorous dissent on the free exercise issue. Citing this Court's recent decision in Lyng v. Northwest Indian Cemetery Protective Association, __ U.S. __, 108 S.Ct. 1319, 1329, 99 L.Ed. 2d 534 (1988), Justice Meschke argued that the state "must show 'with sufficient particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption' for the religious convictions claimed." App. at 39a. He reasoned that the majority had improperly applied this Court's First Amendment tests. "The choice between religious belief and state interest comes only after the State shows that toleration of the religious belief

will seriously undermine the state program of education. Here, the record is bare." App. at 45a-46a. He further reasoned:

> Andersons have advanced the position that North Dakota is nearly alone in enforcing teacher certification for all its teachers, without allowing home schooling. This has not been seriously contested by the State. No argument has been made or evidence offered by the State that the educational efforts of 47 other states, which apparently tolerate some form of home schooling, are failing.[7] In this sensitive constitutional area, the burden of persuasion should be on the influential State, not well-intentioned parents. In this case, the State sought to weigh in only with the bare precedent of Patzer, and made no other effort. To me, that is not enough.

App. at 46a-47a.

Justice Meschke gave weight to the defendant's arguments which pointed that

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[7]Since the time of the briefing and argument in Anderson, Michigan and Iowa have both suspended the application of their laws requiring certification. North Dakota now stands entirely alone.

the experience of the other 47 states (at that time, 49 states currently) which do not require certification was a clear indication that North Dakota has not adopted the least restrictive means available to assure that home schooling is properly accountable. He said:

> The State's sole response [to this argument] was, "What other states may be doing . . . does not, and cannot alter the legal precedence which is well settled on this issue in this Circuit," citing only Patzer, supra. This response cannot be sufficient. If the experience of many other states shows that a religious exemption for home schooling does not seriously impair education of children, this State must certainly explain why conditions are different here. Full respect for free exercise of religion, as a cherished freedom, may well force repeated efforts by the government to show that particular purposes cannot be adequately accomplished without overriding deeply held beliefs by compulsion. The State's position is unacceptable because it offers neither explanation or evidence about how or why its educational system would be significantly impaired or rendered ineffectual by recognizing a religious ex-

> emption. We should not synthesize those effects for the State when they are not properly submitted, as we did in Patzer.

App. at 47a-48a.

Finally Justice Meschke noted that the statute, N.D.C.C. § 15-34.1-03 contains four exemptions from compulsory attendance. One of these in subsection 3, is an exemption from attendance if "the child actually is necessary to the support of his family." He questioned the State regarding this economic exemption.

> Again, the State has made no effort to justify the existence of an economic exemption "necessary to the support of [a child's] family' at the same time it denies one for religious beliefs. Surely, First Amendment values are equal to other values which may be adversely affected by a state program.

App. at 50a.

The majority and dissenting opinions in the Dagley case merely reference their

prior opinions in the Anderson matter.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The North Dakota Supreme Court has clearly misapplied this Court's free exercise standards in these cases. The dispute in this case centers on the "least restrictive means" test.

It is undisputed that North Dakota has the most restrictive law in the nation regarding home schooling.[8] This state now stands alone in requiring that parents possess a state teacher's certificate as the sole criterion in order to be permitted to home school.

The issue of teacher's certification for private schools and home schools has been repeatedly litigated. While the

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[8]We discuss these other states in detail below. See footnote 14.

courts have generally not looked favorably on this issue, the legislative response in most states has been overwhelmingly supportive of less stringent requirements for non-public schools. State after state has abandoned its teacher's certification requirement, especially for home schooling. This is true even where the state has just won a legal victory upholding the constitutionality of its certification requirement.[9]

The scientific and educational evidence points unanimously to the same conclusion -- home schooled children taught by "uncertified" parents are receiving an excellent education. States have consistently removed certification

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[9]See, e.g. Burrow v. Arkansas, 669 S.W.2d 441 (1984). Shortly after this legal victory for the State, the legislature voided the certification requirement by passing a new law. Ark. Stat. 80-1503.4, et seq., enacted 1985.

requirements in favor of a package of requirements which generally require up-front disclosures and after-the-fact accountability (usually testing).

If we were not dealing with a fundamental right, these arguments would be properly reserved for a legislative body, and not for this Court. However, since this does involve the twin fundamental rights of religious freedom[10] and parental freedom to direct the education of their minor children,[11] this Court's role is clear. This situation closely resembles the one this Court faced in McDaniel v. Paty, 435 U.S. 618 (1978). In McDaniel, Tennessee was the only state in the nation to preclude ministers from holding public office. Over the course of our

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[10]Yoder, supra.

[11]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

nation's history, various states had wrestled with minsterial prohibitions and eventually decided that such a disqualification was not necessary to preserve a proper separation between church and state. The court of public opinion and history had judged the ministerial disqualification as unnecessary to maintain religious freedom.

Although it would have been better for the Tennessee legislature to have voluntarily changed its law, when it refused to do so, this Court had every right and obligation to declare the Tennessee law unconstitutional in violation of the Free Exercise Clause.

In a similar vein, the court of public opinion and educational research has rendered its verdict on the need for teacher's certification in home schooling. That verdict is that teacher's

certification is not necessary. Rather, states can (and have) adopted requirements which ensure proper educational accountability without resorting to the extreme requirement of certification.

Like Tennessee in McDaniel, North Dakota clings to a requirement of the past which has been discredited in every other state. This requires families in North Dakota to suffer the loss of their religious freedom even though the State has clearly violated the least restrictive means test. If that test is to have any validity at all, the nation's most restrictive requirement must fall.

B. TEACHER'S CERTIFICATION FLUNKS THE LEAST RESTRICTIVE MEANS TEST

1. North Dakota Stands Alone in Imposing A Teacher's Certification Requirement

Home schooling is one of the fastest growing trends in education. The Wash-

ington Post[12] recently estimated that as many as 500,000 children are being taught at home. The Atlantic Monthly[13] reported even higher estimates.

Legal problems have multiplied when home schoolers have been required to interact with a legal system which did not contemplate this educational phenomenon. Litigation has not solved many problems, but has served as a method of identifying problems and suggesting solutions.

The solution which most states have adopted is to enact a law specifically dealing with the subject of home schooling. Thirty states now have laws which

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[12]"Schooling in the Home," Editorial, Washington Post, August 20, 1988, page A22.

[13]Alfie Kohn, "Home Schooling," Atlantic Monthly, April 1988, pp. 20-25.

specifically govern home schooling.[14]

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[14]These states are listed below with their respective dates of enactment: Arizona, Ariz. Rev. Stat. § 15-802, (1982); Arkansas, Ark. Stat. § 80-1503.4, et seq., (1985); Colorado, C.R.S. § 22-33-104.5,(1988); Florida, F.S.A. § 228.041, (1985); Georgia, Geo. Code Ann. § 322104(b), (1984); Hawaii, Haw. Rev. Stat. § 248-9 (6), amended by Haw. Dept. of Educ. Regs. 4140.2 (D)(4), (1988); Louisiana, LSA-R.S. § 17:236.1, (1984); Maine, Maine Rev. Stat. Ann. § 5001(2)(D), Me. Dept. of Educ. Regs. Ch. 130, § 2, (1988); Maryland, Ann. Code of Md. § 7-301(a),amended by MD Regs. Code 13A § 10.01, (1988); Minnesota, Minn. Stat. Ann. §120.101, (1987); Mississippi, Miss. Code Ann. § 37-13-91(3)(c), (1982); Missouri, R.S. of Mo. § 167.031, (1986); Montana, Mont. Stat. § 20-5-102 (2) (f), (1983); Nevada, N.R.S. 392.070, (1956), see also Nev. Admin. Code Chap. 392 §§ 2-8, (1984); New Hampshire, N.H. Rev. Stat. Ann. § 193:1, amended by N.H. Regulations and Procedures, ED 315.01-04; New Mexico, N.M.S.A. § 22-1-2(U), and § 22-1-2.1, (1985); New York, N.Y. Education Law § 3204, amended by N.Y. Comp. R. & Regs. 8 § 100.1, (1988); North Carolina, NC Gen. Stat. § 115 C-563 through 565, (1988); Ohio, Ohio Rev. Code § 3321.04(A) (2); (1976); Oregon, O.R.S. §339.030(6), (1985); Rhode Island, § 16-19-1 General Laws of Rhode Island, (1984); South Carolina, S.C. Ann. § 59-65-40(A), (1988); Tennessee, T.C.A. § 49-6-3050, (1985); Utah, Utah Code Ann. § 53-24-1 (2), (1957); Vermont,

Twenty-seven of these laws have been adopted since 1982. Not one of these thirty laws require parents to have a teaching certificate as the sole alternative for legally home schooling their own children.

While these thirty state laws have a wide variety of details, there are some general principles which can be found, especially in some of the newer laws.

The new regulations adopted by the New York State Board of Regents in July, 1988,[15] are a typical example of the modern approach to home schooling legis-

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V.S.A. Title 16 §166b, (1987); Virginia, Code of Virginia § 22.1-254.1, (1984); Washington, R.C.W. § 28A.27.010 (4), (1985); West Virginia, W.Va. Code § 18-8-1(b), (1987); Wisconsin, Wisc. Stat. § 115.01 (1r), § 118.15 (4), § 118.165 (1), (1983); Wyoming, W.S. § 21-4-101, et. seq., (1985).

[15]N.Y. Comp. R. & Regs. 8 §100.1 (1988).

lation. New York law now requires that home schooling parents give their local school district notice of their intent to home school their children. Then, on a form supplied by the district, the parents must describe their year's curriculum for each of the state-mandated subjects. Quarterly progress reports are required during the year, which include academic grades or narratives and attendance reports. At the end of the year an annual assessment is required, which may involve either achievement testing or a narrative written by a person who has reviewed the child's work and interviewed the child. The person making the report is chosen by the parent with the consent of the district. Testing is required of all students in some years according to a schedule set forth in the regulations.

It is important to note that in New

York there is absolutely no level of educational qualification for parents. The modern understanding of education is that the proof is in the pudding rather than in the formula. It is understood that up-front qualifications are less important than student results and progress.

The New York package of accountability requirements was modeled in part on a report issued by the National Association of State Boards of Education (NASBE) in June, 1988.[16] NASBE made an extensive study of home schooling regulations and issued a report calling for certain criteria for state laws or regulations on home schooling which they deemed necessary for the protection of an adequate education for children. NASBE did not

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[16]NASBE, 1012 Cameron Street, Alexandria, Virginia, 22314.

recommend teacher's certification for home schooling parents. Rather, the report simply indicates that the minimum requirement should be a high school diploma or its equivalent (GED).

Contrasting the New York package of requirements with the North Dakota law demonstrates in reality that North Dakota has abidicated any resposibility in ensuring that an adequate education is actually occurring. In North Dakota, once a parent qualifies as a certified teacher, no further accountability is required. No tests, no reports, no narratives, nor any other information on the actual achievement of the student is ever required.

The North Dakota legislative scheme is especially irrational in light of the total exemption provided by the N.D.C.C. §15-34.1-03 (3) for children who are

needed to support the family's finances. If a North Dakota farm family wants the child to stay at home and work on the farm, that is permissible. But if a North Dakota family wants the child to receive an education at home, that it impermissible.

Home schooling is legal either by statute or court decision in the remaining twenty states without specific home schooling laws as some form of private education. In two of our most populous states, California and Texas, home schools are treated as private schools.[17] This grants a significant amount of free-

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[17]This approach to the law has been confirmed by recent trial court decisions in each of these states. See, Leeper v. Arlington Independent School District, No. 17-88761-85 (17th Jud. Dist. Tex. April 13, 1987); People v. Darah, No. 853104 (Santa Maria Mun. Ct. Mar. 10, 1986); and People v. Black, No. 853105 (Santa Maria Mun. Ct. Mar. 10, 1986).

dom to home schoolers in those states since private schools are essentially unregulated by the government.

A number of states formerly required teacher's certification for all private education including home schooling. All but North Dakota have abandoned this approach.[18]

Until very recently Iowa and Michigan also enforced certification requirements for private and home schools. During the 1988 legislative session, Iowa passed a one-year moratorium waiving enforcement of the certification requirement to enable the legislature to have time to study the issue to find an appropriate replacement. House File 650, Seventy-

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[18]See, e.g., Florida, F.S.A. 232.02 (4) (1982), and Florida Admin. Reg. 6A-1.951 (1974); New Mexico, N.M.S.A. 22-10-3 (1981); Virginia Code 22.1-254 (1980); Washington, R.C.W. 28A.27.010 (1980).

Second General Assembly of Iowa.

Iowa has abandoned its certification requirement even though it was recently upheld in a private school case by the Eighth Circuit. Fellowship Baptist Church v. Benton, 815 F.2d 486 (8th Cir. 1986).

Michigan's certification requirement is still on the books. However, in a recent development the Michigan Department of Education consented to a change in the application of the law in a case which had previously been decided by the Michigan Supreme Court. Sheridan Road Baptist v. Department of Educ., 396 N.W.2d 373 (Mich. 1986). An equally divided upheld the constitutionality of Michigan's certification requirement. However, on remand the Department of Education relinquished its position and now permits private schools in Michigan

simply to employ person's with a bachelor's degree rather than requiring certification.[19] This stipulation covers all private schools, and home schools are treated as a form of private schooling in that state.

2. The State Made No Attempt To Prove That Its Requirement Was The Least Restrictive Alternative

The petitioners do not take the position that the State of North Dakota is powerless to set any standards for accountability in home schooling. Rather, the Dagleys and Andersons argue that the government can only impose such requirements as are essential to achieve the interest of accountability in education.

This Court has made it crystal clear that the burden of proof or persuasion on

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[19] Sheridan Road Baptist Church v. Department of Education, Ingham County Circuit Court, No. 80-26205-AZ, May 2, 1988 (Mich).

the least restrictive means issue rests squarely upon the state. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S.__, 94 L.Ed.2d 190 (1987). Justice Meschke in dissent properly noted that, "[h]ere the record is bare." App. at 46a. "No argument has been made or evidence offered by the State that the educational efforts of 47 other states. which apparently tolerate some form of home schooling, are failing." App. at 46a.

The majority opinion of the North Dakota Supreme Court totally ignores this Court's language in Wisconsin v. Yoder, 406 U.S. 205, 227 (1972) where this Court held that, ". . .it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would en-

tail."

While the State completely failed to put on any evidence to justify the restrictiveness of its law, the Dagleys and Andersons submitted substantial countervailing evidence. In addition to a description of all of the existing laws on home schooling, there were significant admissions by North Dakota's own experts that less restrictive alternatives were indeed available.

The State Superintendent headed a committee which reported that requiring a bachelor's degree rather than certification would be an acceptable alternative.

It is true that this package of recommendations contained items opposed by home schooling advocates in North Dakota pointing to serious constitutional deficiencies in the proposal. The majority in the North Dakota Supreme Court be-

lieved that because of the clash on the particulars of this report somehow the report was of no value with regard to the existence of a viable, less restrictive alternative.

It is not the duty of any religious litigant to come to a court with a full blown legislative package and say, "This is the alternative we are advocating." This is improper, if for no other reason than that the court hearing the matter would not be empowered to impose such an alternative package.

The issue is: Do the education officials of North Dakota believe that some less restrictive alternative is viable from an educational perspective? The State Superintendent admitted under cross-examination that the Virginia home schooling law appeared to have all of the necessary protections for children to

receive an adequate education.

The Assistant State Superintendent admitted that the House Bill that nearly passed was a viable package and was very nearly in a form acceptable to the State Education Department.

Not once in this trial did either of these state education leaders step up to the witness microphone and say, "Teacher's certification is essential for a proper education for home schooled children." Not only is there a failure demonstrated by silence, but Asst. Superintendent Stastney admitted that there is no scientific basis for imposing teacher's certification as a requirement for home schooling.

In Abington School District v. Schempp, 374 U.S. 203, 279 (1963), this Court declared, "It is not the business of this Court to gainsay the judg-

ments of experts on matters of pedagogy." In this case, the judgment of the State's own education experts, together with those of the defendants, is that there are viable, less restrictive alternatives than the requirement of certification. Usually this Court is faced with situations where the State's experts defend the educational legitimacy of their statutory rule. No such effort was made in this case. Thus, the North Dakota Supreme Court permitted a rule to remain when not even one expert would attest to its validity.

Any lower court which takes seriously this Court's command that strict judicial scrutiny must be applied to "searchingly examine"[20] the State's claimed interest cannot conclude that this record supports

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[20] Yoder, supra, at 221.

a decision favoring the state. Where is the "particularized showing by the State on this point to justify the severe interference with religious freedom" that the extremist requirement of certification entails? Yoder, supra, at 227.

The evidence at the trials of both families indicated that the children in these cases are receiving an education that is clearly more than adequate. The State has made no attempt to contest this fact.

In Yoder, the Amish ceased any kind of formal education beyond the eighth grade. This Court relied heavily on the fact that the Amish could show that, despite any further formal academics, their children were productive members of society. This Court found that in that situation, the interest of the State of Wisconsin was "otherwise served" by the

informal program followed by the Amish.

Here, defendants have shown that the interests of the State are being otherwise served. They have shown this individually by proving that their children are receiving a more than adequate education. They have also shown this generally by demonstrating that home schooling without certified teachers has been proven effective in the rest of the nation.[21]

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[21]At trial in the Dagley matter, the following educational statistics were introduced into evidence regarding Tennessee home schoolers as compared to public school students. Tennessee requires that parents have only a high school diploma in the grades tested.

In 1986 and 1987, home school and public school second graders were given the Stanford Achievement test. The home schoolers scored in the 93rd and 85th percentiles in reading in those two years, compared to public school scores in the 62nd and 64th percentiles.

In grades 3, 6, and 8, students were given Tennessee's own Basic Skills First Achievement Tests, designed around the state public school curriculum. In both

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the North Dakota Supreme Court.

August 25, 1988.

Respectfully submitted,

Michael P. Farris
Home School Legal Defense Association
731 Walker Rd., Suite E-2
P.O. Box 950
Great Falls, VA 22066

Counsel of Record for Petitioners

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reading and math, in all grade levels, and in both 1986 and 1987, the home schoolers averaged better than their public school counterparts. On average, the home schoolers scored nearly 7 percentiles above the public school students.

CERTIFICATE OF SERVICE

Michael P. Farris, counsel of record for petitioners and a member of the bar of this Court certifies that on this day he mailed by first class mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondents as follows:

Wendy P. Schulz
State's Attorney
511 2nd Ave. SE
Jamestown, ND 58401

Wayne D. Goter
Assistant State's Attorney
P.O. Box 190
Mandan, ND 58554

August 26, 1988.

Michael P. Farris

MICHAEL P. FARRIS

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,
Plaintiff and Appellee

v.

DEBORAH ANDERSON,
Defendant and Appellant

Criminal No. 870261

* * * * * * *

STATE OF NORTH DAKOTA,
Plaintiff and Appellee

v.

LAWRENCE ANDERSON,
Defendant and Appellant

Criminal No. 870262

Appeals from the County Court of Stutsman County, Southeast Judicial District, the Honorable Harold B. Herseth, Judge.

AFFIRMED.

Opinion of the Court by Erickstad, Chief Justice.

Wendy P. Schulz (argued), States Attorney, Courthouse, 511 2nd Ave. Southeast, Jamestown, ND 58401, for plaintiff and appellee.

Briggs Law Firm, P.O. Box 887, Fargo, ND 58107-0887, and Michael P. Farris, Home School Legal Defense Association, 731 Walker Road, P.O. Box 950, Great Falls, VA 22066, for defendants and appellants; argued by Michael P. Farris.

State v. Anderson
Criminal Nos. 870261 & 870262

ERICKSTAD, Chief Justice.

Lawrence and Deborah Anderson appeal from county court judgments of conviction for their violation of the compulsory school attendance law, Chapter 15-34.1, N.D.C.C. We affirm.

The parties stipulated that the Andersons continuously lived in the Jamestown School District during the 1986-87 school year and did not send their three school-age children to Jamestown Public Schools during that year. Lawrence testified that he and Deborah believe that God has given them responsibility for their children, including their education, and that their religious convictions require them to teach their children at home. Although they are not certified teachers the Andersons taught

their children at their home school which was not an approved private or parochial school under Section 15-34.1-03(1),-N.D.C.C. Lawrence and Deborah were each charged with three counts of violating the compulsory school attendance law, and after a bench trial, they were found guilty. They have appealed.

The Andersons first contend that the Legislature cannot regulate their home school because Article VIII, §1, of the North Dakota Constitution authorizes the Legislature to create a system of public schools but does not authorize the Legislature to regulated education in non-public schools.

In construing constitutional provisions we apply principles of statutory construction. Federal Land Bank of St. Paul v. Gefroh, 418 N.W.2d 602 (N.D. 1988). Our primary duty is to ascertain

and give effect to the intent and purpose of the framers and adopters of the constitution. Id. Constitutional provisions as well as statutory provisions must be considered as a whole to determine that intent. See County of Stutsman v. State Historical Society of North Dakota, 371 N.W.2d 321 (N.D. 1985). Each section must be harmonized to give effect to each of its provisions whenever fairly possible. Id. In construing the North Dakota Constitution, we must also keep in mind that it is an instrument of limitations of authority whereas the United States Constitution is an instrument of grants of authority. State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977). The North Dakota Legislature thus has plenary powers except as limited by the state constitution, federal constitution, and congressional acts, id., and treaties

of the United States. Art. VI, §2, U.S. Const.

The relevant sections of Article VIII, N.D. Const., provide:

> "Section 1. . . . the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. . . .
>
> "Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, . . .
>
> "Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.
>
> "Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements."

Sections 1 and 2 authorize the Legislature to establish "public schools."

However, those sections must be read and harmonized with Section 4 which authorizes the Legislature to take necessary steps to prevent illiteracy and ensure uniform instruction. Moreover, Section 3, requires that all schools instruct in areas of knowledge that impress upon the mind the importance of "truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind." When each of those constitutional provisions are given effect and harmonized, the Legislature's plenary power is not limited to regulating only "public schools." Rather, those constitutional provisions authorize the Legislature to regulate all schools subject, of course, to limitations that may be imposed by other constitutional provisions and congressional acts.

The Andersons nevertheless cite a

Texas trial court decision, Gary W. Leeper et al. v. Arlington Independent School District et al., No. 17-88761-85 (17th Jud. Dist. Tex. April 13, 1987), in support of their position. In that case Section 21.033(a)(1) of the Texas Education Code provided that any child in attendance at a "private or parochial school" was exempt from the requirements of compulsory attendance; however, the Texas Legislature had not defined "private or parochial school" and had not given the Texas Education Agency or the State Board of Education the authority to define those terms. The Texas court determined that the Texas State Board of Education had no authority to promulgate a rule defining "private or parochial school" in a manner inconsistent with Texas' historical practice of permitting home schools to qualify as private or

parochial schools.

The Texas case was decided on the issue of the legislative delegation of authority to an administrative board and is therefore distinguishable from the issue presented in these cases. Moreover, although Texas had a constitutional provision similar to N.D. Const. Art. VIII, §1, it did not have constitutional provisions similar to sections 3 and 4. Accordingly, we do not believe that the Texas decision provides persuasive authority for interpreting our constitutional provisions. We therefore conclude that Article VIII of the North Dakota Constitution authorizes the Legislature to regulate public and private schools.

The Andersons next contend that Section 15-34.1-03, N.D.C.C., authorizes a financially interested decisionmaker, the local school board, to determined whether

or not a student may be excused from public school attendance. The Andersons assert that the Jamestown School District receives between $1,200 and $1,900 in foundation aid payments for each student attending public school and therefore the local school board has a financial interest in not excusing students from the compulsory attendance law under Section 15-34.1-03, N.D.C.C. Relying on Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), the Andersons argue that Section 15-34.1-03, N.D.C.C., therefore violates the due process clause of the Fourteenth Amendment of the United States Constitution.

The State responds that the Andersons' religious objections are based on having their children taught at schools

utilizing certified teachers as required by Section 15-34.1-03(1), N.D.C.C., and that, pursuant to that section, the local school board does not approve private or parochial schools and has no decision-making power, but merely monitors whether or not school-age children are attending approved schools.[1]

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[1] The State also notes that the Andersons failed to apply for an excuse from the compulsory attendance law under Section 15-34.1-03, N.D.C.C. The Andersons respond that they are raising a facial attack on the constitutionality of Section 15-34.1.-03, N.D.C.C., and therefore they were not required to apply for an excuse in order to raise its constitutionality. Because of our interpretation of Section 15-34.1-03(1), N.D.C.C. we do not decide whether or not the Andersons were required to apply for an excuse in order to raise the constitutionality of Section 15-34.1-03(1), N.D.C.C.

Moreover, a litigant to whom a statute may constitutionally be applied generally cannot challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. E.g., Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); State v. Unterseher, 255 N.W.2d 882 (N.D.

1977). That rule was developed to free courts from "unnecessary pronouncement on constitutional issues," and to prevent "premature interpretations of statutes in areas where their constitutional application might be cloudy." United States v. Raines, 362 U.S. 17, 22, 80 S.Ct. 519, 523, 4 L.Ed.2d 524, 530 (1960). Thus a litigant may contest the constitutionality of a statute only as it is applied to his or her conduct unless there are "weighty countervailing policies" to justify third-party standing. United States v. Raines, supra, 362 U.S. at 22, 80 S.Ct. at 523, 4 L.Ed.2d at 530; State v. Unterseher, supra, 255 N.W.2d at 886; State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 769 (N.D. 1966). See Annot. 50 L.Ed.2d 902 (1978); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

One area in which significant countervailing policies have been found is within the context of First Amendment rights, and facial challenges based upon overbreadth and void-for-vagueness have been permitted in freedom of speech and association challenges under the First Amendment. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); Broadrick v. Oklahoma, supra; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

Although First Amendment freedom of religion issues are involved with other

Section 15-34.1-03, N.D.C.C., provides, in relevant part:

> "The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the

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issues in these cases, this precise due process issue involves whether or not the local school board has an impermissible financial interest in not excusing students from the compulsory attendance law. The Andersons defended this criminal prosecution on the grounds that their religious beliefs would be violated by having their children educated at an approved parochial or private school as required by Section 15-34.1-03(1), N.D.C.C. More specifically the Andersons' religious objections are based on the requirement that in order for a private or parochial school to be approved under Section 15-34.1-03(1), N.D.C.C., it must utilize certified teachers. The Andersons have not asserted that their religious beliefs would be violated by the exceptions to the compulsory attendance law contained in subsections (2), (3), or (4) of Section 15-34.1-03, N.D.C.C., and their due process challenge does not involve "weighty countervailing policies" which would permit them to assert that those subsections of Section 15-34.1-03, N.D.C.C., violate due process.

> satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:
>
> "1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws."

The Due Process Clause entitles a litigant to an impartial, neutral, and disinterested tribunal in both civil and criminal cases. Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). Neutrality in adjudicative proceedings safeguards two critical concerns of procedural due process: the prevention of unjustified or mistaken deprivations and the opportunity for the

individual affected by the decisionmaking to participate in the process with the assurance that the arbiter is not predisposed to find against him. Id. Thus, in Tumey v. Ohio, supra, the United States Supreme Court reversed criminal convictions rendered by a city judge who was also the city mayor and whose salary as mayor was paid in part by fees and costs levied by him in his judicial capacity. The Court stated that the Due Process Clause would not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or might lead him not to hold the balance nice, clear and true between the State and the accused." Tumey v. Ohio, supra, the Court invalidated a procedure by which sums produced from a mayor's court accounted for a

substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums.

In assessing the Andersons' due process argument we must keep in mind that if a statute is susceptible of two constructions, one of which would render it of doubtful constitutionality and one which would not, the latter construction must be adopted. E.g. Jensen v. State, 373 N.W.2d 894 (N.D. 1985).

In order to remove any doubt of due process infirmities under Section 15-34.1-03(1), N.D.C.C., we construe that provision to require the local school board to monitor whether or not a school-age child is attending a school that has been approved by the county superintendent of schools and superintendent of public instruction. The local school board's function is to monitor that at-

tendance, and attendance at an approved private or parochial school automatically satisfies the compulsory attendance law. The local school board's act is a ministerial function rather than a discretionary, decision-making function and is distinguishable from the function of the mayor-city judge in Tumey v. Ohio, supra, and Ward v. Village of Monroeville, supra. We conclude that Section 15-34.1-03(1), N.D.C.C. does not violate the Due Process Clause of the United States Constitution.[2]

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[2] Because the local school board has no decision-making function under Section 15-34.1-03(1), N.D.C.C., we need not balance the interest of the parties to determine the specific dictates of due process. See Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982); Marshall v. Jerrico, Inc., supra; Hortonville Joint School District No. 1 v. Hortonville Education Assn., 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988).

The Andersons next assert that the compulsory attendance law violates the Establishment Clause of the First Amendment of the United States Constitution by requiring religious schools to seek approval from the State.

The First Amendment prevents Congress from enacting laws respecting an establishment of religion or prohibiting the free exercise of religion and was made applicable to the states through the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), and Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

In Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), the United States Supreme Court outlined a three-prong test for assessing whether or not a policy or

statute violates the Establishment Clause:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" [Citation omitted.]

The Andersons contend that because the compulsory attendance law requires advance government approval for religious schools and requires religious schools to employ only teachers certified by the state, the compulsory attendance law violated the Establishment Clause, citing Stark v. St. Cloud State University, 802 F.2d 1046 (8th Cir. 1986), and Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985).

In Stark, supra, St. Cloud State University, a Minnesota public university, permitted students seeking to be-

come licensed teachers to fulfill student teaching requirements by instructing at a parochial high school participating in the University's student teaching program. In the student teaching course, the University placed the student teacher in a participating high school that had contracted to become a student teaching site, and the University paid the participating high school $96 per quarter for each student teacher with no limits on the participating school's use of the money. The student worked under the full-time supervision of a licensed teacher employed by the participating high school, and once a week a supervisor from the University observed the student teacher's classroom performance. A student teacher could, at his or her option, be placed at a private or parochial school selected by the University to

participate in the student teaching program, but final approval of the student teacher's placement rested with the University's field experience coordinator. The student teacher's participation in any religious aspect of the participating high school was exclusively between the school's personnel and the student teacher.

Under those circumstances the Eighth Circuit Court of Appeals concluded that the participating parochial schools were pervasively sectarian institutions and that the University's student teaching program could not help but communicate a message of government endorsement of the parochial schools and their religious messages. The court concluded that there was a union between church and state which had the primary effect of advancing religion in violation of the Establish-

ment Clause.

In Aguilar, supra, New York City used federal funds to pay salaries of public school employees who taught in parochial schools in the city. The program authorized federal financial assistance to local educational institutions, including parochial schools, to meet the needs of educationally deprived children from low-income families. The programs were carried out by regular employees of the public schools who had volunteered to teach in the parochial schools. The instructors were supervised by field personnel who made at least one unannounced visit per month. The field supervisors reported to program supervisors who also made occasional unannounced visits to monitor classes in the parochial schools. The professionals involved in the program were instructed to

avoid involvement with religious activities that were conducted within the private schools and to bar religious materials in their classrooms. All material and equipment used in the funded program was supplied by the State and was used only in those programs.

Under those circumstances the Supreme Court held that the federally funded program violated the Establishment Clause because the state supervision and administrative cooperation required to monitor the educational program required permanent and pervasive state presence in the sectarian schools receiving aid, thus entangling the church and state in a way that infringed interests at the heart of the Establishment Clause. See also Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985).

The primary effect of the state policy and the level of state entanglement with religion in Stark, supra, and Aguilar, supra, is distinguishable from that involved here. In these cases the law requires state approval of private schools and certification of the school's teachers in order for students to be excused from the compulsory school attendance law. Requiring private or parochial schools to employ certified teachers and to obtain prior state approval is not synonymous with the use of state funds to employ teachers at parochial schools. Compare Stark, supra; Aguilar, supra.

As the United States Supreme Court said in Lemon v. Kurtzman, supra, 403 U.S. at 614, 91 S.Ct. at 2112, 29 L.Ed.2d at ___:

"Our prior holdings do not call

> for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts." [Citations omitted.]

Teacher certification and advance government approval of private schools are constitutionally sound means of regulating the adequacy of education and do not indicate a primary effect of advancing or inhibiting religion. Neither do those requirements indicate an excessive government entanglement with religion. We conclude that teacher certification and advance government approval of non-public schools under Section 15-34.1-03(1), N.D.C.C., is a permissible contact between the state and non-public schools and does not violate the Establishment Clause.

The Andersons next contend that the compulsory school attendance law violates the Free Exercise Clause of the First Amendment of the United States Constitution.[3]

Free Exercise analysis in this context requires a determination of (1) whether or not the activity interfered with by the state is motivated by and rooted in a sincerely-held religious belief; (2) whether or not the parents' free exercise of religion has been burdened by the regulation, and, if so, the extent of or the impact of the burden on their religious practice; and (3) whether or not the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion

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[3] The Andersons have not made any due process, establishment, or free exercise arguments under parallel provisions of the North Dakota Constitution.

and overrides the interest of the parents in exercising their religious practices. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); State v. Patzer, 382 N.W.2d 631 (N.D. 1986), cert. denied ___ U.S. ___, 107 S.Ct. 99, 93 L.Ed.2d 50 (1986); State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), cert. denied 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983); State v. Shaver, 294 N.W.2d 883 (N.D. 1980). If the state has a compelling interest which justifies the burden on the free exercise of religion, the state must demonstrate that the regulation constitutes the least restrictive means of ensuring that its primary interest in the education of children is met. Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); State v. Patzer, supra.

The parties concede that the Ander-

sons' religious beliefs are sincere and that teacher certification has an adverse affect on the practice of their religion. They also concede that the State has a compelling interest in the education of children. Thus the only disputed issue in the free exercise are is whether or not the State has chosen the least restrictive alternative to achieve its compelling interest.

The Andersons present several arguments to support their position that teacher certification is not the least restrictive alternative to satisfy the State's compelling interest in education.

The Andersons first argue that the experience from other states demonstrates that less restrictive alternatives to teacher certification are available. That argument was raised in State v. Patzer, supra, and although the Andersons

have also argued that Patzer, supra, was wrongly decided, we decline to deviate from our decision in that case in which we concluded:

> "While a teaching certificate is no guarantee that the holder is a competent teacher, it does guarantee that the holder has been exposed to the knowledge that a competent teacher should have. See Benton, supra. We believe that the teacher certification requirement for instructors in public, non-public, or home schools is a reasonably narrow one and is amply justified. See Jernigan v. State, 412 So.2d 1242 (Ala.Crim.App. 1982). Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons." State v. Patzer, supra, 382 N.W.2d at 639.

The Andersons also argue that the State's own experts now concede that less restrictive alternatives will satisfy the State's compelling interest in education. The Andersons rely on a study done by a Task Force Committee convened in 1985 at the request of Dr. Wayne Sanstead, the

North Dakota Superintendent of Public Instruction. They assert that the results of that study establish that less restrictive alternatives will satisfy the State's compelling interest in education. Thus, they argue that there has been a change in circumstances since this court decided State v. Patzer, supra.

The Assistant Superintendent of the Department of Public Instruction, Ronald Stastney, testified that the Task Force study was conducted to try to achieve a compromise and avoid the litigation that had arisen out of the teacher certification requirement. The Task Force made three proposals. The first proposal authorized home schools for children under the age of thirteen and required teachers in the home schools to have a baccalaureate degree from a college or university recognized by the Department

of Public Instruction. That proposal authorized the local school district board of education to approve and withdraw approval of home schools and included the following provision for supervision of approved home schools:

> "In the instances where local school districts approve home schools, the local school district shall provide a state certified, supervising teacher for the home school to assure that an adequate educational program is being conducted. (Duties of the supervising teacher and local school districts shall be established by the Department of Public Instruction regulations under authority of N.D.C.C. 28-32-01.)"

The second proposal changed the penalty for a violation of compulsory attendance law to a civil penalty of us to $50 for each day of noncompliance.

The third proposal gave the following supervisory responsibilities to the local school district:

> "1. Assignment of Supervising Teacher "Duties:

"a. Home school visitations of a minimum of five hours per month.

"b. Assure that school is operating in accordance with approved calendar.

"c. Assure instruction in those academic subjects is being offered as required by statute.

"d. Assure that proper record-keeping is being maintained and copies provided to the local district (requirements shall be the same as the local district).

"e. Provide technical assistance in teaching methods; use of materials and curriculum requirements.

"f. Assessment of student progress which shall include standardized achievement tests as required by the district for regularly enrolled students, teacher observation, student work and/or program testing.

"g. Report to local district on a regular schedule findings regarding the student and other relevant factors regarding the status of the home instructional program.

"h. Other duties as may be required by the Department of Public Instruction."

The Task Force proposals, along with a proposal from the North Dakota Home School Association, were submitted to the 1987 Legislative Council Interim Education Committee. The Task Force proposals

were opposed by representatives of the Home School Association:

> "They expressed the views that the proposal would have placed several limitations upon the exercise of the freedoms of parents to educate their children at home; arbitrarily cut off the right to teach a child at home after the child reached the age of 13; unconstitutionally violated the principle of 'conflict of interest' because it would have allowed the local school board to approve or disapprove home education when there was a financial stake in the decision (public schools have a financial stake because they receive state aid and other money for each student that attends a public school); arbitrarily and capriciously required parents to have baccalaureate degrees; unconstitutionally delegated legislative authority to the Superintendent of Public Instruction to place additional burdens on home schools with its rulemaking power; unconstitutionally denied equal protection of the law to those who could not afford to pay the civil fine of $50 a day to keep their children at home or in an alternative school; and violated the establishment clause by allowing teachers from public schools to supervise private religious schools." Report of the North Dakota Legislative Council to the Fiftieth Legislative Assembly, 1987, p. 72.

The Interim Committee made no recommenda-

tion to Legislature "due to the difficulties with and opposition to each proposal considered." Report of the North Dakota Legislative Council to the Fiftieth Legislative Assembly, 1987, p. 73.[4]

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[4] Although the Task Force proposals were not introduced at the Fiftieth Legislative Assembly, H.B. 1523 was introduced but did not pass the Legislature. That bill permitted home school instruction provided the court having jurisdiction over the child gave its permission and the instruction was equivalent to that provided in public schools. H.B. 1523 defined equivalent instruction as:

> 1. The parent or guardian providing instruction to the child holds a current North Dakota teacher's certificate, has a college baccalaureate degree, or has passed the basic skills section of a standardized written teacher proficiency examination as prescribed by the superintendent of public instruction.
>
> 2. The child has made satisfactory academic progress as compared to the same standards of promotion or retention in effect for the public schools located within that district as tested by the Iowa test of basic skills (1986 edition), or the Stanford achievement test, or the Cali-

fornia achievement test, or from either one of two additional tests the superintendent of public instruction may select in the areas of the English language, grammar, reading, spelling, social studies, science, and mathematics. In the case of blind, deaf, physically or mentally handicapped children, or children with commonly recognized learning disabilities, the parent, guardian, or other person with custody of the child may substitute for a standardized test a written statement made by a licensed or certified professional trained in the education or evaluation of such children that the educational progress of the child is equivalent to that which would be achieved by a public school. A child attending a defined home school must be tested at the same grade and as frequently as a child in a public school, provided that each test must be given in the child's learning environment. The parent or guardian of the child must choose one of the following persons to monitor the test taking:

"a. A certified teacher.

"b. A local school administrator.

"c. The county superintendent.

3. The home school basic instructional program has been approved by either the school board of the school district where the child resides, or the county superintendent of schools

The substantive proposals from the Task Force and the Home School Associations' opposition to those proposals amply demonstrates that the Task Force Study was conducted to avoid litigation that had arisen out of the teacher certification requirements and do not demonstrate a less restrictive alternative that would satisfy the State's compelling interest in education.

Moreover, on one hand, in the Establishment area, the Andersons have argued that compulsory attendance laws violate the Establishment Clause because it "prohibits the entry of the public teacher or

---

of the county where the child resides, or the superintendent of public instruction. The subsection does not require the program to include any concept, topic, or practice in conflict with the parents' religious doctrines or to exclude from its curriculum any concept, topic, or practice consistent with the parents' religious doctrines."

official into the religious school" and on the other hand, in the Free Exercise area, the Andersons argue that the Task Force proposals, including visits, monitoring, and supervision of the home schools by state personnel, would be less restrictive on their free exercise rights. The Andersons' arguments present a collision between the Free Exercise and Establishment Clauses and demonstrate that less restrictive alternatives do not necessarily satisfy the state's compelling interest in education and at the same time meet the dictates of the Establishment Clause. See State v. Shaver, supra, (VandeWalle, Justice, concurring specially).

We are not persuaded that the Task Force proposals necessarily provide less restrictive alternatives to teacher certification which satisfy the state's

compelling interest in education and avoid the entanglement proscribed by the Establishment Clause. Accordingly, we adhere to our decision in Patzer, supra, that teacher certification does not violate the Free Exercise Clause.

The judgments of conviction are affirmed.

RALPH J. ERICKSTAD, C.J.
GERALD W. VANDEWALLE
BERYL J. LEVINE
H.F. GIERKE, III

MESCHKE, Justice, dissenting.

I largely concur in the analysis of the majority opinion concerning the State Constitution, the Due Process Clause and the Establishment Clause. However, I view the issue on the Free Exercise Clause as more difficult. On that issue, my analysis differs. Therefore, I respectfully dissent.

The Free Exercise Clause of the First Amendment to our United States Constitution declares that government "shall make no law . . . prohibiting the free exercise [of religion]." While not absolute to the exclusion of all governmental interests, this freedom ranks among the foremost-respected values of our diverse American culture. ". . . [W]e have become a Nation of many religions and sects, representing all of the diversities of the human race." Wisconsin v. Yoder, 406 U.S. 205, 249 (1972) (Justice Douglas, dissenting). When government seeks to use the compulsion of our criminal laws to override sincerely held religious beliefs, painstaking judicial review is essential if freedom of religion is to be truly meaningful -- more than a high sounding phrase emptied of purpose by majoritarian winds, as in some na-

tions.

It is well established that judicial review requires a sufficiently important governmental interest to justify a particular burden on the freedom of religion. When evaluating compulsory school attendance laws, the state must show "with sufficient 'particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption'" for the religious convictions claimed. Lyng v. Northwest Indian Cemetery Protective Association, ___ U.S. ___, 108 S.Ct. 1319, 1329, 99 L.Ed.2d 534 (1988) (quoting from Wisconsin v. Yoder, 406 U.S. 205(1972)).

> "Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any

> religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.
>
> ". . . .
>
> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." Wisconsin v. Yoder, supra at 214-215.

The State made no effort to demonstrate that its interest in educating children would be disrupted by granting an exemption for these religious beliefs. The State simply relied upon our decision in State v. Patzer, 382 N.W.2d 631 (N.D. 1986), as binding precedent that teacher certification was "the least personally intrusive method[]" of assuring education

of all children. The majority opinion adopts the same attitude and simply concludes that State v. Patzer is still controlling.

I joined in Justice Levine's opinion for this court in Patzer, supra. That opinion recognized that we were performing "a sensitive and delicate task." 382 N.W.2d at 636. In "[b]alancing the defendant's religious beliefs and the nature of the burden imposed upon those beliefs by the teacher certification requirement," id. at 639, I voted to uphold the teacher certification requirement. But, additional arguments in this case and in other related cases also before us, together with further study of related and new United States Supreme Court decisions on the free exercise of religion, have brought me to view this case differently.

I am now convinced that, in Patzer, we read Yoder to narrowly and focused our analysis inappropriately. We should expect more from the State. The State must affirmatively show us that its compulsory education program would not work if it granted a religious exemption to these defendants. Our responsibility is to strictly scrutinize the need for the State's purpose to prevail over sincere religious convictions.

We have a recent teaching from the United States Supreme Court about how Yoder should be interpreted and applied:

> "The statute at issue in that case [Yoder] prohibited the Amish parents, on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion. Id., at 207-209, 223. The statute directly compelled the Amish to send their children to public high schools 'contrary to the Amish religion and way of life.' Id., at 209. The Court acknowledged that the statute might be constitutional, despite its coercive nature,

> if the state could show with sufficient 'particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.' Id., at 236 (citation omitted). The dissent's out-of-context quotations notwithstanding, there is nothing whatsoever in the Yoder opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature." Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. at 1329.

Lyng held that the Free Exercise Clause did not prohibit the United States Government from permitting timber harvesting or constructing roads on lands owned by the United States which were sacred to certain American Indians. Lack of coercion to participate in an internal government action was a key factor in Lyng. The dissent by Justice Brennan, and joined by Justices Marshall and Blackmun, makes that vividly clear. This case is coercion by criminal prosecution.

I think we were also mistaken when we read Yoder as only involving "exceptional considerations" of a community of like minded, religious people with "a long history of being a successful, self-sufficient segment of society." 382 N.W.2d at 637. It is well established that the Free Exercise Clause does more than protect established religions and discrete groups. Individual religious beliefs, as much as institutionalized ones, are protected by our Constitution. In Thomas v. Review Board, 450 U.S. 707, 715-716 (1981), the United States Supreme Court said that the "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." Justice O'Connor's pointed remarks for the majority in Lyng emphasize this eloquently:

" . . . [T]he dissent . . . offers us

> the prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play." Lyng, 108 S.Ct. at 1329-30.

Thus, our analysis should be focused on the State's showing of how an exemption for religious belief would affect the state's educational program, more than on how the intrusion would affect sincere individual beliefs. ". . . [I]t would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail." Wisconsin v. Yoder, supra at 227. The choice between

religious belief and state interest comes only after the State shows that toleration of the religious belief will seriously undermine the state program of education. Here, the record is bare.

Andersons have advanced the position that North Dakota is nearly alone in enforcing teacher certification for all its teachers, without allowing home schooling. This has not been seriously contested by the State. No argument has been made or evidence offered by the State that the educational efforts of 47 other states, which apparently tolerate some form of home schooling, are failing. In this sensitive constitutional area, the burden of persuasion should be on the influential State, not well-intentioned parents. In this case, the State sought to weigh in only with the bare precedent of Patzer, and made no other effort. To

me, that is not enough.

> ". . . [T]his case involves the fundamental interest of parents as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, supra at 232.

We are told by these defendants that only three states, including North Dakota, require teacher certification for all teachers, while all other states permit home schooling in some form. The State's sole response was, "What other states may be doing . . . does not, and cannot alter the legal precedence which is well settled on this issue in this Circuit," citing only Patzer, supra. This response cannot be sufficient. If the experience of many other states shows that a reli-

gious exemption for home schooling does not seriously impair education of children, this State must certainly explain why conditions are different here. Full respect for free exercise of religion, as a cherished freedom, may well force repeated efforts by the government to show that particular purposes cannot be adequately accomplished without overriding deeply held beliefs by compulsion. The State's position is unacceptable because it offers neither explanation or evidence about how or why its educational system would be significantly impaired or rendered ineffectual by recognizing a religious exemption. We should not synthesize those effects for the State when they are not properly submitted, as we did in Patzer. See 382 N.W.2d at 637, footnote 4.

"This would be a very different case

> for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State." Wisconsin v. Yoder, supra at 238 (Justice White, concurring).

This State does recognize exemptions from compulsory education. An administrative procedure is already in place for processing exemption claims based upon good reasons. There is not only the approved "parochial or private school" exemption in subsection 1 of N.D.C.C. 15-34.1-03, quoted in the majority opinion. There are three more:

> "2. That the child has acquired the branches of learning taught in the public schools and has completed high school.
>
> "3. That the child actually is necessary to the support of his family, which shall be a question of fact to be determined by the governing board of the district with the approval of the county superintendent of schools, and such determination shall be subject to review by the superintendent of public instruction on appeal.

> "4. That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable. Such condition shall be shown by a declaration of a multi-disciplinary team which includes the director of special education of the special education unit of which the school district of residence is a member, the school superintendent of the child's district of residence, the child's classroom teacher, the child's physician, and the child's parent or guardian." (emphasis added).

I refer to these legislated excuses to illustrate that exemptions can and do exist while carrying out a general program of educating children. Again, the State has made no effort to justify the existence of an economic exemption "necessary to the support of [a child's] family" at the same time that it denies one for religious beliefs. Surely, First Amendment values are equal to other values which may be adversely affected by a state program.

I believe that the North Dakota compulsory school-attendance law does interfere with the freedom of these defendants to act in accordance with their sincere religious beliefs. I believe that the State has failed to show that its interest in establishing and maintaining an educational system overrides these defendants' rights to free exercise of their religion. Therefore, I respectfully dissent.

HERBERT J. MESCHKE.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,
Plaintiff and Appellee

v.

MARK AND LYNETTE DAGLEY,
Defendants and Appellants.

Criminal No. 870180

Appeal from the County Court of Morton County, South Central Judicial District, the Honorable Thomas J. Schneider, Judge.

AFFIRMED.

Per Curiam.

Wayne D. Goter (argued), Assistant State's Attorney, P.O. Box 190, Mandan, ND 58554, for plaintiff and appellee.

Richardson, Isakson & Lange, P.O. Box 488, Hazen, ND 58545, and Michael P. Farris, Home School Legal Defense Association, P.O. Box 950, Great Falls, VA 22066, for defendants and appellants; argued by Michael P. Farris. Appearance by Gregory L. Lange.

State v. Dagley
Criminal No. 870180

PER CURIAM.

Mark and Lynette Dagley appealed from a conviction of an infraction under NDCC Chapter 15-34.1 on compulsory school

attendance for failing to send their daughter to public school. The constitutional issues raised are controlled by our recent decision in State v. Anderson, ___ N.W.2d ___ (Civil Nos. 870261-62; N.D. 1988). We affirm under NDRAppP 35.1(a)(7).

BERYL J. LEVINE
GERALD W. VANDEWALLE
H.F. GIERKE, III
RALPH J. ERICKSTAD, C.J.

MESCHKE, Justice, dissenting.

I respectfully dissent for the reasons given in my dissenting opinion in State v. Anderson, supra.

HERBERT J. MESCHKE

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HON. HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

STATE OF NORTH DAKOTA,)
Plaintiff,)
)
vs.)
)
DEBORAH ANDERSON,)
LAWRENCE E. ANDERSON,)
Defendants.)

MEMORANDUM OPINION

The defendants each stand charged with three counts of violating the compulsory school attendance, as provided under 15-34.1 of the North Dakota Century Code.

Trial was had, and it was shown that the defendants are parents of three children, each of which were between the ages of seven and sixteen years. There was an attempt, by the defense, to show that the children were not educable as required by

the statutes, but I do not make that finding; and, in fact, I believe the bulk of the evidence showed that each child was very educable.

The defendants' three children had attended parochial and public schools prior to the 1986-87 year but were not enrolled in any school that year but were being kept at home where the parents were teaching them. Neither of the parents are certified by the State of North Dakota to teach.

The matter has been briefed extensively to the Court, and I have studied the briefs.

The defendants state that the application of North Dakota law is unconstitutional as applied to them on several grounds.

1. The defendants first raise the Establishment Clause of the constitution.

That clause has no application here. The state requirement that a child be educated by a state approved institution is not the establishment of a religion, no matter how far you stretch the clause.

2. The defendants challenge the authority of the State of North Dakota to regulate non-private schools. The contention is not new, and it has been held time and time again that the State does have an overriding concern when it comes to the education of its young residents. This contention is without merit.

3. The next contention is that the State's certification law is not the least restrictive method of satisfying the State's concern for education of its youth. This is not a new issue either. The defense contends that a study was done by a legislative interim committee. A subcommittee made recommendations to

the legislative committee, which was requested by the committee, is evidence that the Certification Law is not the least restrictive means to accomplish the State's responsibility. That study was just that, a study, nothing more. The subcommittee's recommendations were rejected by the committee, and nothing changed.

This matter has also been determined many times over.

4. The defendants next urge that the due process clause applies, and that school boards' decisions might be based on some selfish financial concern. I do not accept that premise; and even if one did, the law in question requires no decision by the school board until such time as a parent applies to have his or her child exempted under one of the grounds listed in the statute. The de-

fendants made no such application.

5. The defendants raise the equal protection clause, stating that under North Dakota Law, only the rich can receive a religious education. It would appear that the defendants are suggesting that the State has an obligation to support parochial schools, thereby infringing on the establishment clause raised in another argument above. The State is not obligated to send any child to a private school absent a child's special learning needs. None has been shown here.

6. The defendants next content that parents cannot be forced to send children to schools which have curriculum which the parents find objectionable. This contention has no application to this matter, since it is not supported by the evidence. The evidence was to the contrary; that the Jamestown Public School

had made changes in its curriculum in order to avoid teaching curriculum to which the defendants objected. Mr. Anderson's testimony showed that the objection to public schooling went far beyond the curriculum alone.

I conclude that the defendants are each guilty of three counts of violating the compulsory attendance provisions as set out in Chapter 15-34.1, N.D.C.C.

Sentencing will take place on the 1st day of September, 1987, at 9:00 A.M.

Dated this 14th day of August, 1987.

BY THE COURT:

HAROLD B. HERSETH
County Judge

STATE OF NORTH DAKOTA
COUNTY OF MORTON

IN COUNTY COURT

THE STATE OF NORTH DAKOTA,)
Plaintiff,)
vs.)
)
MARK AND LYNETTE DAGLEY,)
Defendant.)

MEMORANDUM OPINION
Crim. #86-459

The Defendants are charged with violating §15-34.1-01 of the North Dakota Century Code. §15-34.1-01, N.D.C.C., provided that, "Every parent . . . who resides within any school district . . . and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of Sections 15-34.1-02 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session."

§15.34.1-02 is the compulsory atten-

dance statute for children that are deaf, blind, or mentally deficient.

§15-34.1-03 provides for exceptions to the compulsory attendance statute.

Any person who fails to comply with the requirements of Chapter 15-34.1 is guilty of an infraction. §15-34.1-05, N.D.C.C.

During the trial, the evidence presented showed that the Defendants are husband and wife and that they have control over and are the parents of Carrie Dagley, an eight year or girl, born September 27, 1978. The Defendants reside within the Mandan Public School District at 1006 3rd Street Southwest, in the city of Mandan, Morton County, North Dakota. Neither Defendant is a certified teacher. However, the Defendants are teaching Carrie at home during the 1986-87 school year. The Defendants home school is

called the Dagley Home Academy. Carrie is an educable child who does not fall under the provisions of Section 15-34.1-02 or 15-34.1-03. The Defendants did not apply to the school board for any exceptions compulsory school attendance pursuant to §15-34.1-03.

The Defendants have asserted that this case is not a rehash of State v. Patzer, 382 N.W.2d 631 (N.D. 1986). In their trial brief, the Defendants asked the Court to "apply the Constitution of the United States to declare the North Dakota law requiring teachers certification unconstitutional because: (1) the facts have changed; (2) the law has changed particularly as it relates to decisions by federal courts on the federal constitution; and (3) because of the application of theories not advanced or considered in Patzer."

The Defendants have raised the issue of due process. They point to the cases of Tumey v. Ohio, 273 U.S. 510 (1927) and Ward v. Monroeville, 409 U.S. 57 (1972). In essence, the Defendants are saying that the school boards are not neutral, but are financially motivated. The financial motivation comes from the fact that the school districts receive a certain sum of money per child enrolled in the school district. The Defendants did not show that the school board denied them the right to teach their child at home based on financial reasons. The Defendants never requested or applied to the school board for any exceptions to compulsory school attendance. There is no evidence in the record to show that any school board in any school district in the State of North Dakota denied any person the right to send their child to a

non-public school becaue the school district would lose revenue. Once the requirements of §15-34.1-03 are met . . . a child . . . shall be excused . . . School boards have limited discretionary power.

The Defendants contend that only the wealthy have the right to a religious education under North Dakota Law. There is no question that a parent has the right to give their child a religious education. However, in Harris v. McRae, 448 U.S. 297 (1980), the United States Supreme Court said at page 318:

> It cannot be that because government may not . . . prevent parents from sending their child to a private school, . . ., government, therfore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to . . . send their children to private schools.

The above statement in Harris applies to this case.

The next issue is whether the Defen-

dants, because of their religious beliefs, have the right to educate their child at home without complying with teacher certification. As was stated above, the Defendants are not certified teachers. They do, however, have substantial education. The North Dakota Supreme Court in Patzer analyzed and followed Wisconsin v. Yoder, 406 U.S. 205 (1972), which requires a three pronged inquiry to determine whether teacher certification is unconstitutional. The three-pronged inquiry is:

> (1) Whether the activity interfered with by the State is motivated by and rooted in a legitimate and sincerely held religious belief;
> (2) Whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices;
> (3) Whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices.

The State in this case has challenged the sincerity of the Defendants' religious beliefs. The State contends that there are inconsistencies in the Defendants' beliefs which are difficult to resolve. However, it appears that the Defendants' beliefs are based on their perception of God's role in the education of their child or children. This Court accepts that the Defendants hold these beliefs as sincere religious beliefs.

The second prong in Patzer requires that it must be determined whether or not the free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices. The Defendants have not objected to all State supervision. The claim is that teacher certification imposes a burden on their religious be-

liefs, which require teaching their child or children at home. As concluded in Patzer, this Court finds that the Defendants have demonstrated an indirect burden upon their religious beliefs.

The third prong is compelling State interest. In discussing compelling State interest, the North Dakota Supreme Court in State v. Shaver, 294 N.W.2d 883 (N.D. 1980), said it must be determined (1) whether or not the state has a compelling interest in the compulsory school attendance law which justifies the burden imposed on the free exercise of religion; and (2) whether or not the least restrictive means to accomplish the objective have been utilized.

The State has a compelling interest in education. The North Dakota Supreme Court in Shaver, Rivinius, and Patzer, clearly established the State's important

role in education and the Court justified the burden imposed on the free exercise of religion.

As to least restrictive means, I quote from Patzer, page 639:

> We believe that the teacher certification requirement for instructors in public, non-public, or home schools is a reasonably narrow one and is amply justified. See Jernigan v. State, 412 So.2d 1242 (Ala. Crim. App. 1982). Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons.

Thus, the Court held that the requirement of teacher certification was the least restrictive and constitutional.

But, the Defendants are suggesting that a fresh look be taken at the issue of least restrictive means. Through testimony, they have pointed to (1) a study conducted by Dr. Wayne Sanstead, State Superintendent of Public Instruc-

tion, and (2) the development by other States of laws concerning home schooling.

The committee chaired by Dr. Sanstead did study home schooling and Dr. Sanstead did state during a deposition:

> . . . that baccalaureate gives recognition to some kind of educational attainment that would indicate the person should be able to handle an elementary, and I underscore the word "elementary" -- an elementary pupil in some type of home schooling.

Defendants Exhibit N.

However, the baccalaureate requirement also requires annual testing of children taught at home. See VA Code Section 22.1-254.1. The North Dakota Supreme Court has already considered and rejected testing as an alternative. Patzer, at 638. The annual testing of the children taught at home would not result in the discovery of a deficiency until the end of the school year. Patzer, at 628. Thus, it was felt that

testing would not satisfy the State's interest in educating its youth. Patzer, at 638.

The study done by Dr. Sanstead's committee did not result in the North Dakota State Legislature passing a baccalaureate degree exception.

Since this case was tried, the U.S. Court of Appels, Eighth Circuit, in Fellowship Baptist Church v. Benton, upheld teacher certification in Iowa. The Eighth Circuit agreed with the District Court that the State's choice of certification as the best means available today to satisfy its interest in the education of its children does not violate the right to the free exercise of religion. The Fellowship Baptist Church opinion is significant for North Dakota because (1) North Dakota is in the Eighth Circuit, and (2) the opinion appears to confirm

the Patzer decision as to teacher certification.

Based on the foregoing, I find that the Defendants are guilty of violating the compulsory school attendance law, §15-34.1-01 of the North Dakota Century Code.

A time and date for sentencing will be set unless the Defendants file a waiver of personal appearance pursuant to Rule 43 N.D.R.Crim.P.

Dated this 1st day of June, 1987.

BY THE COURT:

Thomas J. Schneider
County Judge

Supreme Court, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-350

In The

Supreme Court of the United States

October Term, 1988

DEBORAH ANDERSON AND LAWRENCE ANDERSON,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

MARK DAGLEY AND LYNETTE DAGLEY,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

WAYNE D. GOTER
Assistant State's Attorney
Morton County, North Dakota
210 2nd Avenue Northwest
Mandan, ND 58554
(701) 667-3350
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether § 15-34.1-03(1) of the North Dakota Century Code which requires all teachers who teach in private home schools in North Dakota to be certified, violates the Free Exercise Clause of the First Amendment to the United States Constitution by impermissibly prohibiting petitioners from the free exercise of their religion.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Constitutional and Statutory Provisions 2

Statement of the Case 5

Summary of Argument 8

Argument 10

I. North Dakota Compulsory School Attendance Laws Do Not Prohibit Petitioners From The Free Exercise Of Their Religions 10

II. North Dakota's Teacher Certification Requirement Is The Least Restrictive Means By Which The State Can Meet Its Compelling Interest In Education 12

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES:

Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) 15, 16

Brown v. Topeka Board of Education, 374 U.S. 483 (1954) 12

Burrows v. Arkansas, 669 S.W.2d 441 (1984) 12

Cantwell v. Connecticut, 320 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) 10

Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987) 12, 15

Johnson v. Charles City Community Schools Board of Education, 368 N.W.2d 74 (Iowa) cert. denied sub nom., 474 U.S. 1033, 106 S.Ct. 594, 88 L.Ed.2d 574 (1985) 12

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. ___, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988) 10, 11, 15

Sheridan Road Baptist Church v. Department of Education, 426 Mich. 462, 396 N.W.2d 373, cert. denied, 107 S.Ct. 2183 (1987) 12

State v. Patzer, 382 N.W.2d 631 (N.D.), cert. denied, 107 S.Ct. 99 (1986) 12, 13, 14

State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), cert. denied, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983) 12, 13

State v. Shaver, 294 N.W.2d 883 (N.D. 1980) 12

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) 11, 15, 16

No. 88-350

In The

Supreme Court of the United States

October Term, 1988

DEBORAH ANDERSON AND LAWRENCE ANDERSON,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

MARK DAGLEY AND LYNETTE DAGLEY,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review

of the decision of the Supreme Court of the State of North Dakota in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented in this petition involves the following constitutional and statutory provisions.

UNITED STATES CONSTITUTION

United States Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

United States Constitution Fourteenth Amendment:

> . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . .

NORTH DAKOTA CONSTITUTION

North Dakota Constitution Article VIII, § 1

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people; being necessary in order to insure the continuance of that government and the propriety and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North

Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

NORTH DAKOTA CENTURY CODE

North Dakota Century Code § 15-34.1-01

Compulsory attendance. Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

North Dakota Century Code § 15-34.1-03

Compulsory attendance – Exceptions. The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North

Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

2. That the child has acquired the branches of learning taught in the public schools and has completed high school.

3. That the child actually is necessary to the support of his family, which shall be a question of fact to be determined by the governing board of the district with the approval of the county superintendent of schools, and such determination shall be subject to review by the superintendent of public instruction on appeal.

4. That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable. Such condition shall be shown by a declaration of a multidisciplinary team which includes the director of special education of the special education unit of which the school district of residence is a member, the school superintendent of the child's district or residence, the child's classroom teacher, the child's physician, and the child's parent or guardian.

North Dakota Century Code § 15-36-01

Teachers' certificates – Criteria to be established. The superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification for school terms beginning on or after July 1, 1974. The established criteria shall be based upon

standards which shall include considerations of character, adequate education preparation, and general fitness to teach in the public schools of this state. After holding a public hearing thereon, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates, and such certificates shall be issued by his office in accordance with such rules and regulations. However, any teacher who has graduated from college in an accredited teacher education program on or before September 1, 1980, shall not be required to earn any college credits in native American or other multicultural courses in order to be certified or recertified. Nothing in this section shall be interpreted to affect the validity of life certificates in existence on July 1, 1973, nor shall this section affect vocational education certificate qualifications as provided in chapter 15-20.1.

STATEMENT OF THE CASE

Under North Dakota law parents are required to send their children from seven to sixteen years of age to public school. Upon application to the local school board, parents may be excused from compliance with the compulsory school attendance law, inter alia, on the basis of the child's attendance at an approved private school. However, under North Dakota law, every teacher within the state, whether employed in a public, parochial, or private school, must be certified and therefore, for a private home school to be approved, its teachers must be certified. Petitioners challenge the constitutionality of the teacher certification requirement on the ground that it violates the Free Exercise Clause of the First Amendment to the United State Constitution.

Petitioners, Mark and Lynette Dagley, are husband and wife and at all times material, they lived in the city of Mandan and within the Mandan Public School District. They are the parents of a daughter, Carrie, who was born September 27, 1978, and who was required to attend public school during the 1986-87 school year unless otherwise excused. The Dagleys did not send Carrie to a public school during the 1986-87 school year, nor did they apply for an excuse from attendance from the Mandan School Board. Instead, they themselves undertook to educate Carrie in their home in what the Dagleys claim is a private or home school which they named the Dagley Home Academy. The Dagleys never sought to have the Dagley Home Academy approved as a private school. However, the Dagley Home Academy was not eligible for approval. Although each of the Dagleys is college educated neither Mark nor Lynette Dagley was a certified teacher in the State of North Dakota.

The Dagleys were charged on October 1, 1986, with violating the state's compulsory school attendance law for their failure to send Carrie to a public school. They were found guilty of this offense after a trial to the court on March 24 and 25, 1987, and on July 2, 1987, the court deferred the imposition of sentence for one year on the condition the Dagleys commit no further violations of the compulsory school attendance law.[1]

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[1] Violations of the compulsory school attendance law are classified as infractions for which the maximum penalty is a

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During trial Mark Dagley testified in essence that his refusal to send Carrie to public school was based in part because he believed the Dagley Home Academy could provide better education than the public school, in part because he wanted to avoid negative peer influences, and in part because his religious beliefs required him to be responsible for his child's education. He testified that he would not be averse to sending Carrie to a private school whose philosophy and content of instruction would be compatible with his religious beliefs, but he maintained that the cost of this education would be unduly burdensome since there was no such school in the immediate area. Neither Mark nor Lynette Dagley expressed any personal objection to becoming a certified teacher, but both claimed that they could not afford the time and expense necessary in becoming certified as teachers. Both of the Dagleys testified that they would be agreeable to a state system of regular testing and evaluation of their home school in lieu of teacher certification.

Experts for both sides testified that North Dakota ranks very high in the nation in the quality of its education, despite the fact that its teacher corp is among the lowest paid in the nation. The Dagleys' expert witness attributed this phenomena to various factors including socio-economic factors and smaller class sizes. These factors distinguish North Dakota from most of the other states. The State's expert witness, Mr. Stastney, would also include as a major contributing factor teachers'

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$500.00 fine. However, under state law a second violation of the same infraction within one year can, upon motion of the prosecuting attorney, be classified as a Class B Misdemeanor which is punishable by a maximum fine of $500.00 and a maximum jail sentence of thirty days.

knowledge and ability to teach acquired through the certification process.

The Dagleys claim that two major alternatives to teacher certification were available which would do just as well in meeting the state's interest in the education of its youth. The first alternative was a series of rejected proposals for legislation during the last session of the North Dakota Legislature that would have eliminated the teacher certification requirement for private home schools. However, all of these proposals called for a system of regular testing and evaluation of the private home school in lieu of teacher certification. The state's expert conceded that these various rejected proposals would adequately meet the state's interest in the education of its youth, but only because of the testing and evaluation. The second alternative to teacher certification consisted of the Dagleys' presentation of statutory schemes in other states which they labeled and presented as less restrictive alternatives.

The case of petitioners, Deborah and Lawrence Anderson, presented similar facts and a similar challenge to the North Dakota teacher certification requirement by claiming that these same lesser restrictive alternatives were available to meet the state's compelling interest in education.

SUMMARY OF ARGUMENT

None of these petitioners claim a religious-based objection to the certification concept. They merely argue they want to teach their children themselves, but they do

not want to go to the time and trouble of obtaining certification. At most then, the teacher certification requirement merely makes it more difficult for these petitioners to practice their religious beliefs. It does not prohibit these petitioners from the exercise of their religious beliefs nor does it work as an indirect coercion or penalty on the free exercise of those beliefs.

Contrary to petitioners' claims, the North Dakota teacher certification requirement is the least restrictive means available for the state to meet its compelling interest in education. The rejected proposals for new legislation, which would have in effect required regular testing and evaluation of private, religion-oriented home schools, appear to be no less restrictive and arguably are more restrictive than teacher certification.

Petitioners' premise that the experience of other states establishes a less restrictive alternative cannot be accepted because: (1) this is essentially the same argument as petitioners present in their first alternative to teacher certification, (2) the matter of compulsory education is essentially a state or local issue which should properly be addressed by each state in the manner it deems best, provided the means used does not prohibit the free exercise of religious beliefs, and; (3) this argument, if followed to its logical conclusion, would inevitably result in a determination that virtually every other state's compulsory education statute is unconstitutional.

ARGUMENT

I. NORTH DAKOTA COMPULSORY SCHOOL ATTENDANCE LAWS DO NOT PROHIBIT PETITIONERS FROM THE FREE EXERCISE OF THEIR RELIGIONS.

This Court has repeatedly held that the Free Exercise Clause protects not only against prohibitions on the free exercise of religion, but also against indirect coercions and penalties on the free exercise of religion.[2] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988). However, as the Court noted in *Lyng, supra*, the critical word in the constitutional text of the First Amendment is the word "prohibit." Therefore, if governmental action does not prohibit free exercise rights or tend to coerce individuals into acting contrary to their religious beliefs, that action is not subject to scrutiny under the First Amendment. *Lyng, supra*, 108 S.Ct. at 1326. Therefore, governmental actions which merely make it more difficult to practice certain religions do not, "require the government to bring forward a compelling justification for its otherwise lawful actions." *Id.* Here, petitioners testified at trial that their decision not to educate their children in the public schools or comply with compulsory school attendance laws was based only in part upon their religious beliefs. Those beliefs did not require petitioners to refrain from placing their children in the public schools. Petitioners

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[2] The same restriction on governmental action applies to state governments as well through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

only asserted that their ability to teach principles of their religious beliefs to their children would be enhanced by private home schooling. Petitioners did not allege or contend at any time that they are opposed to the teacher certification requirement on religious grounds. They only argue that the teacher certification requirement makes it more difficult for them to educate their children themselves. The facts of this case then are significantly different then those presented in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In *Yoder, supra,* the religious beliefs in question compelled the parents to refrain from educating their children in public high schools. To do so would have been contrary to the Amish religion and way of life. 406 U.S. at 209, 92 S.Ct. at 1530. Here, petitioners present no such religious objection to education. They themselves are well educated having extensive college educations. Moreover, these petitioners do not segregate themselves from society as the Amish did in *Yoder, supra.* These petitioners seek to become well educated and to use their education to pursue careers in which they intermingle with the rest of society. Consequently, the North Dakota compulsory school attendance laws, in particular the teacher certification requirement, do not prohibit, in the sense that word is used in the Free Exercise Clause, petitioners from the free exercise of their religious beliefs. The best argument petitioners can make is that this statutory scheme merely makes it more difficult for them to practice their religious beliefs. This argument is not sufficient to invoke First Amendment scrutiny. *Lyng, supra,* at 1326.

II. NORTH DAKOTA'S TEACHER CERTIFICATION REQUIREMENT IS THE LEAST RESTRICTIVE MEANS BY WHICH THE STATE CAN MEET ITS COMPELLING INTEREST IN EDUCATION.

Like any other state, North Dakota has a compelling interest in the education of its people. *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), *State v. Patzer*, 382 N.W.2d 631 (N.D.), cert. denied, 107 S.Ct. 99 (1986). As a matter of state constitutional law, every child in the state has a right to a public school education, free from sectarian control. N.D. Const. Art. VIII § 1. As part of its effort to meet this compelling interest, North Dakota has long required that all of its teachers be certified, whether they be employed in public, parochial or private schools. N.D.C.C. §§15-34.1-03 and 15-36-01. This requirement has been upheld against challenges based on Free Exercise grounds before. *State v. Pratzer, supra; State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), cert. denied, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980). In each of these cases the court rejected claims that teacher certification was not the least restrictive method for the state to meet its compelling interest in education. Likewise, similar teacher certification requirements have been upheld against similar challenges in other jurisdictions. *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (Iowa), cert. denied sub nom., 474 U.S. 1033, 106 S.Ct. 594, 88 L.Ed.2d 574 (1985); *Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W.2d 373, cert. denied, 107 S.Ct. 2183 (1987); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Burrows v. Arkansas*, 669 S.W.2d 441 (1984).

The North Dakota Supreme Court in *Patzer, supra,* noted, "While a teacher certificate is no guarantee that the holder is a competent teacher, it does guarantee that the holder has been exposed to the knowledge that a competent teacher should have." *State v. Patzer,* 382 N.W.2d at 639. If the "modern understanding of education is that the proof is in the pudding rather than in the formula,"[3] then the North Dakota teacher certification requirement has stood the test and proved itself. Traditionally, North Dakota students have ranked very high in the nation in achievement. In short, the teacher certification requirement works very well. It meets the State's compelling interest in education.

Petitioners make a claim that it is "undisputed that North Dakota has the most restrictive law in the nation regarding home schooling." Petition for Writ of Certiorari, at p. 24. The State believes this claim is made without any foundation whatsoever in light of the fact that this issue has been thoroughly litigated, argued, and decided in favor of the state in *State v. Patzer, supra; State v. Rivinius, supra* and *State v. Shaver, supra.* Moreover, petitioners do not present any authority, criteria, or established rule of law by which they can support this claim. The only apparent basis for petitioners' claim that North Dakota's law is the most restrictive, because of its teacher certification requirement, is their own say so. That is not enough. In *State v. Patzer, supra,* the North Dakota Supreme Court compared its teacher certification requirement to provisions in other states which allowed home schooling by instructors with qualifications "essentially

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[3] Petition for Writ of Certiorari, at p. 33.

equivalent" to minimum standards set for public school teachers. The court also looked at statutory schemes which used systems of testing and subjective evaluation in lieu of teacher certificates. *State v. Patzer, supra* at pp. 638-9. After making such review the court concluded that the teacher certification requirement "is a reasonably narrow one and . . . amply justified . . . The court upheld teacher certification against a claim it was not the least restrictive alternative available, and further found teacher certification to be preferred to testing in meeting the State's interest in education.

Petitioners claim that there is now new evidence to show that other less restrictive alternatives are available. First, they point to various bills of proposed legislation which the North Dakota Legislature rejected during its last session. All of those rejected proposals would have substituted teacher certification with a system of testing and evaluation. They were borrowed from laws of other states. These alternatives therefore were not new, and were not materially different from those which the court rejected in *State v. Patzer, supra,* and which the court had found to be arguably more restrictive than teacher certification. *Id.* at 638-9. Thus, petitioners' claim of a less restrictive alternative to teacher certification on this ground is without merit.

Petitioners' second claim of a less restrictive alternative, namely the statutory schemes or experiences of other states, is, for the same reasons, also without merit. It may be true that since *State v. Patzer, supra,* was decided, other states have moved away from teacher certification. However, this is not to say that teacher certification is more restrictive. This fact is evidence only

that those states have chosen not to regulate teacher training.

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), this Court admonished other courts to "move with great circumspection in performing the sensitive and delicate task of weighing a state's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements." *Id.* at 235, 92 S.Ct. at 1543. "[C]ourts are not school boards or legislatures, and are ill-equipped to determine the necessity of discrete aspects of a state's program of compulsory education." *Id.* Following this admonition, the Court in *Fellowship Baptist Church v. Benton, supra* at 493, rejected the argument that the experience and statutes of other states constituted a less restrictive alternative to teacher certification. In *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), this Court, in determining that the Pennsylvania Sunday closing law did not violate the Free Exercise Clause, considered statutory schemes from other states which were proposed as less restrictive alternatives. This Court rejected such evidence and arguments, noting, "[T]his may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation, but with its constitutional limitation." 366 U.S. at 608. These cases have implicitly recognized that a particular state's social or educational concerns when faced with religious claims for exemption are an essentially local concern which cannot be and should not be determined by other states' laws. As this Court recognized in *Braunfeld v. Brown, supra,* and very recently in *Lyng, supra,* all that is required

of North Dakota is that its law comply with the dictates of the Free Exercise Clause. That, the State has done.

Moreover, petitioners argue that only the very least restrictive alternative will suffice, but then, to support this statement they lay on the table various statutory schemes of other states, no two of which are the same. Using petitioners' logic, only one state could claim to have the "least restrictive alternative" concerning the statutory means of regulating private home schools and even that one state would be subject to a claim that some heretofore untried statutory scheme would be even less restrictive. Hence, petitioners' argument here is self-defeating. Obviously, this Court in *Braunfeld, supra,* and *Yoder, supra,* recognized this problem in allowing a particular state to deal with social and educational concerns in a manner it deems best.

CONCLUSION

The North Dakota compulsory school attendance laws do not prohibit these petitioners from the free exercise of their religious beliefs. Moreover, even if the teacher certification requirement for private, religious-oriented home schools does infringe upon petitioners' rights under the Free Exercise Clause, it does so constitutionally because the teacher certification requirement is the least restrictive means by which North Dakota can meet its compelling interest in the education of its youth. For these reasons, the petition for writ of certiorari should be denied.

Dated this 3rd day of November, 1988.

Respectfully submitted,

WAYNE D. GOTER
Assistant State's Attorney
Morton County Courthouse
210 2nd Avenue Northwest
Mandan, North Dakota 58554

Attorney for Respondent